

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 January 2007

CASE NO.: 2005-BLA-6324

In the Matter of:

R. H.

Claimant

v.

CEDAR COAL COMPANY

Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS

Party in Interest

APPEARANCES:

Otis R. Mann, Jr. Esq

For the Claimant

David L. Yaussy, Esq

For the Employer

Before: DANIEL L. LELAND

Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Charleston, West Virginia on August 30, 2006 at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations found in Title 20 Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title. At the hearing, Director's exhibits (DX) 1-33, claimant's exhibits (CX) 1-4, and employer's exhibits (EX) 1-5 were admitted into evidence. Post hearing exhibits that have been admitted in evidence are CX 5- Dr. Thomas Miller's interpretation of the September 7, 2005 x-ray, and CX 6- Dr. Miller's curriculum vitae. Claimant and employer filed post-hearing briefs.

ISSUES

- I. Existence of pneumoconiosis.
- II. Causal relationship of pneumoconiosis and coal mine employment.
- II. Existence of total disability.
- IV. Causation of total disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

Procedural History

R. H. (the miner) filed the present claim for benefits on October 15, 2004 (DX 3). (The miner's prior claim had been withdrawn.) The claim was denied by the district director on June 6, 2005 and the miner requested a hearing. (DX 23). The case was referred to the Office of Administrative Law Judges on September 20, 2005. (DX 30).

Background

The miner was born on September 30, 1928 and his only dependent is his wife. (DX 3). His employment records indicate that he was employed as a coal miner for thirty four and one half years for Imperial Colliery Company, Union Carbide Corporation, and Cedar Coal Company. (DX 1, DX 4, DX 6). The miner retired from coal mining in October 1984. (DX 6). For the last nine months of his coal mine employment, he worked in the safety department making safety checks on underground equipment. (TR 28-29). Almost all of his work for Cedar Coal was as a mine foreman. Id at 30. He checked the returns and the intakes and did clerical work. Id at 31. He did not do heavy work like unloading timbers or rock dusting on a steady basis. Id. The miner stated that he started being short of breath when he was employed in the mines and that his shortness of breath is now worse. Id at 26. He takes no medication for his breathing difficulties. Id at 27. The miner testified that he started smoking cigarettes about 1944 and smoked one pack a day until the late 1970s. Id at 34.

¹ The following abbreviations have been used in this opinion: DX=Director's exhibit, CX=claimant's exhibit, EX=employer's exhibit, TR=transcript of hearing, BCR=board certified radiologist, B=B reader.

Medical Evidence

Chest x-rays

<u>Exhibit</u>	<u>Date</u>	<u>Physician</u>	<u>Interpretation</u>
DX 12	1/19/05	Patel, BCR, B	2/1, s/t
DX 12	1/19/05	Binns, BCR, B	quality 2
CX 2	1/19/05	Miller, BCR, B	1/1, p/s
EX 4	1/19/05	Spitz, BCR, B	negative for pneumoconiosis
EX 3	9/7/05	Zaldivar, B	negative for pneumoconiosis
EX 5	9/7/05	Wiot, BCR, B	negative for pneumoconiosis
CX 1	9/7/05	Miller, BCR, B	1/1, t/q
CX 5	9/7/05	Miller, BCR, B	1/2, t/q ²
CX 4	1/19/06	Gaziano, B	1/1, q/q
EX 2	1/19/06	Wiot, BCR, B	negative for pneumoconiosis

Pulmonary Function Studies

<u>Exhibit</u>	<u>Date</u>	<u>Height</u>	<u>Age</u>	<u>FEV1</u>	<u>FVC</u>	<u>MVV</u>
DX 9	3/7/95	70 in.	66	2.42	4.05	106
DX 12	1/19/05	70 in.	76	2.32	3.63	64
EX 3	9/7/05	70 in.	76	2.24	3.92	----
				2.36*	3.91*	----
CX 3	1/18/06	70 in.	77	2.16	3.73	73
				2.31*	3.88*	----

*post bronchodilator

Blood Gas Studies

<u>Exhibit</u>	<u>Date</u>	<u>PCO2</u>	<u>PO2</u>
DX 12	1/19/05	39	73
		37*	68*
EX 3	9/7/05	30	89
		30*	88*
CX 3	1/19/06	39	77

*exercise values

Medical Reports

On March 7, 1995, the West Virginia Occupational Pneumoconiosis Board concluded that the miner has occupational pneumoconiosis and a 30% pulmonary functional impairment. (DX 9).

² Dr. Miller interpreted the September 7, 2005 x-ray on two occasions.

Dr. D. L. Rasmussen examined the miner on January 19, 2005. (DX 12). Dr. Rasmussen stated that the miner's last coal mine job was a mine foreman which required considerable walking and crawling and considerable heavy labor. He recorded a cigarette smoking history of one pack of cigarettes a day from 1945 to 1986. The miner's chest x-ray was interpreted as 2/1, s/t by Dr. Patel, the ventilatory studies showed a minimal obstructive impairment, there was a minimal impairment in oxygen transfer in the exercise blood gas test, and the diffusion capacity was moderately reduced. Dr. Rasmussen diagnosed coal workers' pneumoconiosis and COPD/emphysema due to coal mine dust exposure and cigarette smoking. He concluded that the miner is disabled from doing moderate to heavy work and therefore he is disabled from resuming the duties of his last coal mine job. The two causes of the miner's impaired pulmonary function are cigarette smoking and coal mine dust exposure, and therefore coal mine dust exposure is a major contributing factor to his disabling lung disease, Dr. Rasmussen opined. Dr. Rasmussen determined that the miner has both clinical and legal pneumoconiosis.

The miner was evaluated by Dr. George Zaldivar on September 7, 2005. (EX 3). Dr. Zaldivar noted the miner's coal mine employment history and that his last job was a mine foreman. He also determined that the miner had started smoking cigarettes as a teenager and had smoked a pack a day until eighteen years ago. A childhood history of asthma was also recorded. Dr. Zaldivar performed a physical examination, a chest x-ray, pulmonary function studies, and a blood gas test. His findings were no radiographic evidence of pneumoconiosis, but a suggestion of pulmonary fibrosis in the lower portion of the lungs, mild to moderate irreversible airway obstruction, minimal air trapping by lung volumes, moderate diffusion impairment, low carboxyhemoglobin of a current nonsmoker, and normal cardiopulmonary stress test at an oxygen consumption of 14.7 cc/kg/min. As the stress test and blood gases were normal, Dr. Zaldivar concluded that the diffusion abnormality is a result of lung remodeling from asthma and is of no clinical significance. Dr. Zaldivar stated that the miner does not have coal workers' pneumoconiosis or any dust disease of the lungs, he has no pulmonary impairment, and the mild abnormalities in the spirometry and diffusion are the result of his past smoking habit combined with untreated asthma.

In a supplemental report dated May 23, 2006, Dr. Zaldivar reviewed his recent report and his report based on his examination of the miner in May 1986. He again concluded that there is no evidence of pneumoconiosis radiographically and no pulmonary impairment. (EX 3).

Dr. D. Gaziano examined the miner on January 19, 2006. (CX 3). Dr. Gaziano credited the miner with coal mine employment from 1950 to 1984 and recorded a one pack a day cigarette smoking habit from 1943 to 1986. The physical examination was normal, the chest x-ray was positive for pneumoconiosis, the spirometry indicated mild irreversible obstruction, and a resting blood gas test demonstrated a mild decrease in oxygen tension at rest. Dr. Gaziano concluded that the miner has coal worker's pneumoconiosis and a mild degree of pulmonary functional impairment.

After reviewing his own pulmonary function studies and blood gas tests and the pulmonary function studies and blood gas tests performed by Dr. Zaldivar, Dr. Gaziano submitted a report on June 1, 2006. (CX 4). Dr. Gaziano stated that based on the pulmonary

function studies, particularly the reduced diffusion, he did not believe that the miner could do heavy or very heavy work, but he would be able to do medium work.

After an extensive review of the miner's medical records, Dr. John Bellotte concluded that the miner does not have coal workers' pneumoconiosis or any pulmonary impairment attributable to pneumoconiosis. The miner does have significant problems with chronic obstructive pulmonary disease, emphysema, and chronic bronchitis due to smoking, and he may have some asthma, Dr. Bellotte observed. (EX 1).

Conclusions of Law

Benefits are provided to miners who are totally disabled due to pneumoconiosis arising out of coal mine employment. § 718.204(a). The miner has the burden of proving by a preponderance of the evidence that he has pneumoconiosis arising out of coal mine employment and that he is totally disabled as a result. *Gee v. W. G. Moore & Sons, Inc.*, 9 BLR 1-4 (1986). A finding of the existence of pneumoconiosis may be made based on chest x-rays, autopsies or biopsies, the presumptions in §§ 718.304, 718.305, or 718.306, and the reasoned medical opinion of a physician that the miner has pneumoconiosis as defined in § 718.201.³ § 718.202(a)(1)-(4). All types of relevant evidence must be weighed to determine if the miner has pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F 3d 203 (4th Cir. 2000).

There are three chest x-rays in the record. The January 19, 2005 x-ray was interpreted as positive for pneumoconiosis by two board certified radiologists/B readers, Dr. Patel and Dr. Miller, and negative for pneumoconiosis by Dr. Spitz, who is also a board certified radiologist/B reader. Therefore it must be considered a positive x-ray. The September 7, 2005 x-ray was read as negative by Dr. Zaldivar, a B reader, and by Dr. Wiot, a board certified radiologist/B reader, and positive for pneumoconiosis by Dr. Miller. A preponderance of the interpretations of the September 7, 2005 is negative for pneumoconiosis.⁴ Finally, the January 19, 2006 x-ray was read as positive for pneumoconiosis by Dr. Gaziano, a B reader, and negative for pneumoconiosis by Dr. Wiot. Dr. Wiot's superior credentials support a finding that the January 19, 2006 x-ray is negative for pneumoconiosis. *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). As two of the three chest x-rays in the record are negative for pneumoconiosis, the evidence does not establish that the miner has clinical pneumoconiosis.⁵

³ Pneumoconiosis is defined as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment, and it includes both medical, or "clinical", pneumoconiosis and statutory, or "legal" pneumoconiosis. See § 718.201(a). Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. § 718.201(a)(1). Legal pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. § 718.201(a)(2). A disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. § 718.201(b).

⁴ Although Dr. Miller interpreted this x-ray twice, I do not give any additional weight to his second reading.

⁵ There is no biopsy evidence in the record and the miner is not eligible for the above-noted presumptions.

Dr. Rasmussen determined that the miner has legal as well as clinical pneumoconiosis. He averred that the miner's COPD/emphysema was related to coal mine dust exposure as well as cigarette smoking. But he did not explain how he was able to determine that the miner's pulmonary impairment was due to his thirty four years of coal mine employment as opposed to his forty three years of cigarette smoking. Dr. Rasmussen's opinion is therefore unreasoned and I give it little weight. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Dr. Gaziano's finding of pneumoconiosis is based solely on his positive reading of a chest x-ray which was found to be negative by a more qualified physician. Dr. Zaldivar and Dr. Bellotte determined that the miner does not have coal workers' pneumoconiosis. Therefore, a preponderance of the evidence fails to demonstrate the presence of legal pneumoconiosis.

A miner shall be considered totally disabled if the irrebuttable presumption in § 718.304 applies. If that presumption does not apply, a miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. § 718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability shall be established by pulmonary function studies showing the values equal to or less than those in Appendix B, blood gas studies showing the values in Appendix C, the existence of cor pulmonale with right sided congestive heart failure, or the reasoned and documented opinion of a physician finding that the miner's pulmonary or respiratory impairment prevents him from engaging in his usual coal mine work and comparable and gainful work. § 718.204(b)(2).

None of the pulmonary function studies or blood gas tests has produced qualifying values. There is no evidence that the miner has cor pulmonale. Dr. Rasmussen found that the miner's usual coal mine work as a mine foreman required considerable heavy labor and that he is disabled from performing that job.⁶ However, the evidence indicates that as a mine foreman, the miner acted in a supervisory capacity, conducted safety inspections, filled out paper work, and did little in the way of strenuous labor. Dr. Rasmussen's finding of total disability is therefore based on an incorrect understanding of the miner's usual coal mine work. Dr. Gaziano stated that the miner's pulmonary impairment precludes him from doing heavy or very heavy labor, but that he could do medium labor. Clearly, the miner's job as a mine foreman can not be characterized as heavy or very heavy labor. Dr. Zaldivar and Dr. Bellotte concluded that the miner does not have any pulmonary impairment, and Dr. Zaldivar stated that the diffusion abnormality was of no clinical significance. I find that the evidence does not establish that the miner is totally disabled.

As the evidence does not establish the existence of pneumoconiosis or total disability the claim will be denied. The miner's counsel is precluded from receiving a fee for his legal work on this case.

⁶ The miner's last job as a safety inspector does not qualify as his usual coal mine work because he held the job for only nine months. See *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534 (1982).

ORDER

IT IS ORDERED THAT the claim of R. H. is DENIED.

A

DANIEL L. LELAND
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).